

1989

City of St. George vs. Elza E. Miller : Petition for Rehearing

Utah Court of Appeals

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Theodore W. Shumway; attorney for respondent.

G. Michael Westfall; Gallian and Westfall; attorney for appellant.

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 890428 IN THE UTAH COURT OF APPEALS

CITY OF ST. GEORGE,)
Plaintiff/Respondent,)
vs.) CASE NO. 890428-CA
ELZA E. MILLER,)
Defendant/Appellant.)

PETITION FOR RE-HEARING

On Appeal from the Fifth Circuit Court
in and for Washington County, State of Utah
Honorable Robert F. Owens, Circuit Court Judge, presiding

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FILED

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COURT OF APPEALS

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ATTORNEY FOR APPELLANT

Appellant, by and through his attorney, G. Michael Westfall of the law firm of GALLIAN & WESTFALL, hereby petitions the Court for a re-hearing in the above-entitled matter pursuant to Rule 35 of the Rules of the Utah Court of Appeals.

STATEMENT OF THE CASE

1. Following a non-jury verdict in Washington County Fifth Circuit Court, Criminal Case No. 891000348, Appellant was found guilty of violating Utah Code Annotated §76-9-102(1)(b)(i), St. George City Code as adopted, an Infraction. Appellant was sentenced to pay a fine, part of which was suspended, and was placed on probation. This Appeal followed.

2. Appellant's Brief was submitted for filing on or about the 22nd day of September, 1989. Respondent's Brief was submitted for filing on or about the 24th day of October, 1989. No notice of oral argument has been sent to Appellant.

3. Appellant's Brief raised four issues for review, including a claim that the evidence presented at trial was insufficient to support the verdict that the Appellant engaged in "threatening behavior", that the Trial Court had improperly restricted Appellant's presentation of evidence in two particulars and finally, that the statute the Appellant was found to have violated constituted an unconstitutional infringement on his freedom of speech as applied.

4. The Appellate Court, without making a finding concerning any of the factors set forth in Rule 29(a) of the Rules of the Utah Court of Appeals which permit oral argument, decided this case

without the benefit of oral argument in a Memorandum Decision filed December 8, 1989. In that decision the Court upheld the ruling of the Trial Court with regard to the admissibility of evidence, concluding that there was insufficient basis on which the Appeals Court could make a finding that the Trial Court had abused its discretion in excluding the evidence. The Court of Appeals also concluded that Appellant's use of "fighting words is not entitled to constitutional protection," and in so doing, declined to follow the decision of the Oregon Court of Appeals in State vs. Cantwell, 676 P.2d. 353 (Or. App. 1984).

5. The Court of Appeals did not, however, address Appellant's claim that there was insufficient evidence to find that he had engaged in threatening behavior even if there were sufficient evidence to find that he had expressed threatening words, a crime with which he was not charged.

ARGUMENT

In its Memorandum Decision the Court of Appeals concluded that Appellant's statements were fighting words and therefore not entitled to constitutional protection. The Court then briefly discussed State vs. Cantwell, 676 P.2d. 353 (Or. App. 1984), a case in which the Oregon Court of Appeals determined that its statute prohibiting threatening behavior did not infringe on an individual's freedom of speech since the statute prohibited behavior and not speech. This Court indicated that it declined to follow Cantwell, but supplemented that statement with an apparently related comment that Appellant's "use of fighting words is not entitled to constitutional protection".

It appears from the language of the Court of Appeals' decision that the analysis of Cantwell by the Court of Appeals was limited to the constitutional issue presented, that is, whether or not Appellant's speech was entitled to constitutional protection. However, the distinction between behavior and speech has significance that extends beyond the constitutional issue. The issue for which Appellant seeks re-hearing in this Court is whether there was sufficient evidence at trial to support a finding by the Trial Court that the Appellant engaged in threatening behavior when the only evidence presented at trial related to Appellant's expression of words.

In Appellant's Brief specific reference was made to two statutes which relate to the use of language as an element of a criminal offense. Utah Code Annotated §76-9-102(1)(b)(iv) declares it a crime to engage in abusive language in a public place intending to cause public inconvenience, annoyance, or alarm or recklessly creating a risk thereof, and Utah Code Annotated §76-9-102(1)(b)(iii) declares it a crime to make unreasonable noises in a private place which can be heard in a public place with the intent to cause public inconvenience, annoyance, or alarm or recklessly creating a risk thereof. Both of those sections relate to inappropriate sounds, whether in the form of words or otherwise, as an element of the crime of disorderly conduct.

UCA §76-5-107 provides that a person commits terroristic threat if he (1) threatens to commit any offense involving violence with (2) intent to place a person in fear of imminent serious bodily

injury. This statute is clearly intended to punish the verbal expression of intent to cause serious bodily harm as opposed to physical conduct other than speech that is of a threatening nature.

A broad application of the term "threatening behavior" to include speech is inappropriate in light of threatening speech having been addressed as a criminal offense in at least the three statutes previously mentioned. However, the State Legislature has even more clearly expressed its intention that a difference be recognized between threatening behavior and speech by specifically providing that the use of "threatening words" may constitute an element of a criminal offense.

Pursuant to Utah Code Annotated §77-3-10, a Judge or Magistrate is authorized to order a person to give security and if he refuses to do so may commit the person if he "assaults or threatens to assault another or to commit an offense against person or property, or who contends with another with threatening words..." in the presence of the Judge or Magistrate. Obviously the Legislature recognizes the significance of the distinction between threatening speech and behavior by specifically referring to threatening words in this context.


In light of the Legislature's prohibiting verbal threats in other sections of the criminal code and the Legislature's specific reference to threatening words in Utah Code Annotated §77-3-10, it is apparent that Utah Code Annotated §76-9-102(1)(b)(i) is intended to prohibit behavior other than the expression of words.

Since there was no evidence at trial that the Defendant did anything but express words, there was insufficient evidence at trial to support the Court's finding of guilt beyond a reasonable doubt.

WHEREFORE Appellant respectfully requests that the Court grant a re-hearing on the issue presented herein.

DATED this 21st day of December, 1989.

GALLIAN & WESTFALL

By: 
G. Michael Westfall

CERTIFICATE OF GOOD FAITH

I, G. Michael Westfall, counsel for Appellant certify that this Petition is presented in good faith and not for delay.

DATED this 21st day of December, 1989.

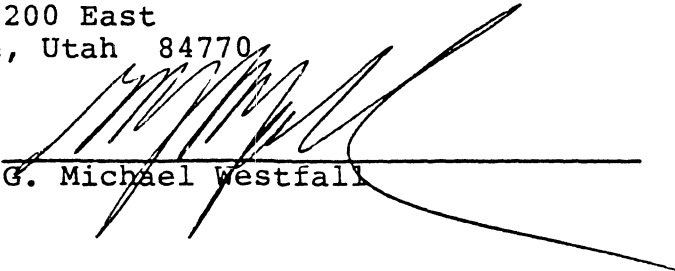
GALLIAN & WESTFALL

By: 
G. Michael Westfall

CERTIFICATE OF MAILING

I hereby certify that I caused 4 copies of the above and foregoing document to be mailed, postage pre-paid on this 21st day of December, 1989, to the following:

Theodore W. Shumway
175 North 200 East
St. George, Utah 84770


G. Michael Westfall